MATCHPLAN (MALAYSIA) SDN BHD & ANOR

v.

WILLIAM D SINRICH & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[SUIT NO: S2-22-561-1997]
11 FEBRUARY 2000

CIVIL PROCEDURE: *Stay or setting aside - Application for - Failure by opposing party to challenge averment of facts in affidavit in support - Whether application should be granted - Application proceeded pursuant to O. 12 r. 7 Rules of the High Court 1980 - Whether said order provided for stay - Whether alternative prayer of setting aside should be granted*

The plaintiffs sued the defendants for libel in respect of two publications made by the defendants. The plaintiffs then obtained an *ex parte* order to issue and serve a notice of writ outside jurisdiction, *ie*, to the defendants' address in London and that the defendants be given 30 days to enter appearance from the date of service of the writ. The defendants then applied *ex parte* for leave to enter conditional appearance and for a stay of all further proceedings until the determination of the defendants' application to set aside or to strike off the writ and statement of claim. The senior assistant registrar dismissed the said application. Hence, the defendants' appeal.

Held:

[1] In order to establish that this court had the jurisdiction to try this action, the plaintiffs had to prove that the said defamatory letters were published in Malaysia. In order to constitute publication in Malaysia, the plaintiffs were required to prove that the said letters were published to a third party in Malaysia and not just to the plaintiffs.

[1a] Since the affidavit of the 1st defendant clearly denied any publication to any third party and since there was no challenge to that denial, this court accepted such denial as true and thus acceded to the defendant's application.

[2] The defendants had proceeded in this application pursuant to O. 12 r. 7 Rules of the High Court 1980. Since the said order did not provide for a stay, this court granted the alternative prayer of setting aside this action with costs.

[Appeal allowed; decision of senior assistant registrar set aside.]

Legislation referred to:
Rules of the High Court 1980, O. 12 r. 7

For the appellant/defendant - Lorraine Cheah (Jyoti Sharma with her); M/s Shearn Delamore & Co
For the respondent/plaintiff - Harjit Singh Pannu; M/s Gill & Tang

Reported by Usha Thiagarajah

JUDGMENT

RK Nathan J:

Facts

The plaintiffs sued the defendants for libel in respect of two publications made by the defendants. The plaintiffs then applied *ex parte* for and obtained an order dated 19 March 1998 to issue and serve a notice of writ outside jurisdiction, that is to the defendants' address in London and that the defendants be given 30 days to enter appearance from the date of service of the writ on them.

The defendants then applied *ex parte* for leave to enter conditional appearance and for a stay of all further proceedings until determination of the defendants' application to set aside or to strike off the writ and statement of claim. The defendants stated in their affidavit in support of the *ex parte* application that the alleged publication was not made in Malaysia and that the onus was upon the plaintiffs to establish that the said publications were indeed done to third parties other than to the plaintiffs in Malaysia before the cause of action in libel accrued. The defendants also contended that Malaysia was not the *forum conveniens*. The senior assistant registrar (SAR) dismissed the said application with costs and directed the defendants on 14 September 1999 to file the defence within 14 days from the date of her order. The defendants appealed against the said order.

The defendants then filed an application for stay of these proceedings until the appeal was heard. On 8 October 1999 the defendants withdrew the said application for stay. On 26 October 1999 I heard the appeal. I set aside the decision of the learned SAR and allowed the appeal with costs. The plaintiff has since appealed against my said decision.

The Evidence In Support

The 1st defendant affirmed an affidavit both on his behalf and on behalf of the 2nd defendant. He averred that all the facts he had deposed to were from his personal knowledge or were from the records of the 2nd defendant to which he had unrestricted access, except where specified. He confirmed that

he was residing at the address stated in London, and that the 2nd defendant was incorporated in the U.S.A. and had its registered place of business in London. He affirmed under oath that although the two alleged defamatory letters addressed to the 2nd plaintiff and written by the 1st defendant stated that copies of the same two letters were extended to third parties, in actual fact copies of the said two letters were never sent by the defendants to the said third parties referred to in the said two letters. He averred that this fact was made known to the plaintiffs by a letter from the 2nd defendant dated 20 February 1997 and addressed to the plaintiffs' solicitors. A copy of the said letter was also exhibited, attached to the 1st defendant's affidavit filed in support of the application. He again reiterated that the said two alleged defamatory letters were only sent by facsimile to the 2nd plaintiff in Malaysia at his office in the 1st plaintiff's premises and that no copies were ever sent by facsimile, post or other means to any one else in Malaysia.

Findings Of The Court

What is surprising is that the plaintiffs failed to file any reply to counter the averments of the 1st defendant in his affidavit in support of the application. The averments of facts such as the denial that copies were in fact sent to the persons named in the letter, were not challenged in any way by the plaintiffs. Whilst I agree that the plaintiffs might have no evidence to challenge such a denial, all that was required was for the plaintiffs to challenge that fact by requiring strict proof from the defendants that notwithstanding the fact that third party names were mentioned in the said two letters, copies of these two letters were indeed not sent to them.

Another factor the plaintiffs could have raised was that since the said two letters were faxed to the 2nd plaintiff in Malaysia, at his office, there was a possibility that the staff could have read the letters resulting in publication to third parties. There was however absolutely no challenge to the facts averred by the defendants.

The defendants have proceeded in this application pursuant to O. 12 r. 7 of the RHC. The said rule reads as follows:

> 7. (1) A defendant to an action may at any time before entering an appearance therein, or, if he has entered a conditional appearance, within 14 days after entering the appearance, apply to the Court for an order setting aside the writ or service of the writ, or notice of the writ, on him, or declaring that the writ or notice has not been duly served on him or discharging any order giving leave to serve the notice on him out of the jurisdiction.
>
> (2) An application under this rule must be made by summons.

It is trite law that in order to establish that this court has jurisdiction to try this action, the plaintiffs have to prove that the said two defamatory letters were published in Malaysia. In order to constitute publication in Malaysia, the plaintiffs are required to prove that the said letters were published to a third party in Malaysia and not just to the plaintiffs. Since the affidavit of the 1st defendant clearly denies any publication to any third party and since there is no challenge to that denial I must accept such denial as true and thus acede to the defendants' application. On this ground alone I decided, without the need to consider the other issues raised, to allow the appeal and to set aside the decision of the learned SAR. Since O. 12 r. 7 does not provide for a stay I granted the alternative prayer of setting aside this action with costs.